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In the Supreme Court of the United States

OCTOBER TERM, 1985

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

FINANCIAL INSTITUTION EMPLOYEES OF AMERICA, LOCAL 1182, CHARTERED BY UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO, ET AL.

SEATTLE-FIRST NATIONAL BANK, PETITIONER

v.

FINANCIAL INSTITUTION EMPLOYEES OF AMERICA, LOCAL 1182, CHARTERED BY UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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1. The Union contends that the two parts of the *Amoco IV* rule—unit-wide vote and continuity—rest on mutually inconsistent premises (Resp. Br. 29).[1] Specifically, the

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[1]Preliminarily, the Union contends (Resp. Br. 15-17) that, since the *Amoco IV* rule represents an allegedly radical change in a policy that was settled for many years and since its validity implicates the agency's statutory authority, the Board's decision is not entitled to the deference from the reviewing court which it would normally receive. There is no

Union argues that, while the Board justifies the need for a unit-wide vote on the ground that union affiliation decisions "involve 'the selection of a bargaining representative,' " the Board simultaneously recognizes in its continuity requirement that "an affiliation—like the other evolutionary changes unions continuously effect—does *not* ordinarily raise a question of representation" (*ibid.*; emphasis in original). This argument misconceives the purpose of *Amoco IV's* unit-wide vote requirement and its relation to the continuity requirement.

As explained in our opening brief (at 14-16 & n.10), the Board, in the interest of avoiding an unnecessary disruption of stable bargaining relationships, has recognized that

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merit to this contention. First, as shown in our opening brief (at 19-21), the Board's treatment of changes in union structure and organization has been anything but settled. *United Retail Workers Union Local 881* v. *NLRB*, No. 84-2000 (7th Cir. Oct. 1, 1985), slip op. 19. Rather, it has been one where " 'the Board has more or less felt its way * * * and has modified and reformed its standards on the basis of accumulating experience.' " *NLRB* v. *Weingarten, Inc.*, 420 U.S. 251, 265 (1975), (quoting *Electrical Workers* v. *NLRB*, 366 U.S. 667, 674 (1961)). Second, "[a]n administrative agency is not disqualified from changing its mind; and when it does, the courts still sit in review of the administrative decision and should not approach the statutory construction issue *de novo* and without regard to the administrative understanding of the statutes." *NLRB* v. *Iron Workers*, 434 U.S. 335, 351 (1978). Accord: *NLRB* v. *Action Automotive, Inc.*, No. 83-1416 (Feb. 19, 1985), slip op. 4 n.4. Nor does an exception to the normal standard of review of Board interpretations of the National Labor Relations Act exist for so-called jurisdictional or statutory authority questions. See *NLRB* v. *City Disposal Systems, Inc.*, No. 82-960 (Mar. 21, 1984), slip op. 6-7 n.7. The function of the reviewing court in this case was merely to determine whether the Board's *Amoco IV* rule was a reasonable implementation of the Act's policies, and, if it was, the court was required to uphold the rule even though a different rule would have been equally reasonable. See *NLRB* v. *A.J. Tower Co.*, 329 U.S. 324, 330 (1946); *NLRB* v. *Truck Drivers Union*, 353 U.S. 87, 96 (1957); *Pattern Makers' League* v. *NLRB*, No. 83-1894 (June 27, 1985), slip op. 2 (White, J., concurring).

many changes in union organization and structure, including many affiliations, do not create an entirely new entity and therefore do not raise a question concerning representation that must be resolved through the Board's formal election procedures.[2] But, as also shown in our opening brief (at 22-23), even where an affiliation does not create a completely new entity and thus raise a question concerning representation, the resulting changes can still significantly affect the union's representation of the entire bargaining unit. If the Board were to amend the designation of the employees' bargaining representative to reflect the affiliation, it would thereby cloak the affiliated union with exclusive authority to represent the entire bargaining unit and with the full panoply of rights and protections that flow from that status (see NLRB Br. 13-14 n. 6, 18-19 n. 12).[3] The *Amoco IV* requirement of a unit-wide vote on the affiliation is a reasonable means of satisfying the Board—before it substitutes the newly affiliated union for the old union as the employees' statutory representative—that all of the employees whose representation could be affected by the changes caused by the affiliation had an opportunity to vote on it under procedures that at least minimally approximate those used when employees make their initial choice of a representative.[4]

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[2]Thus, to the extent that the Union argues (Resp. Br. 20-24 & n. 12) that a union, during its tenure as bargaining representative, is likely to go through a process of evolutionary change and not every change is sufficient to put in doubt the union's continued majority status, we agree.

[3]Contrary to the Union's view (Resp. Br. 33), the Board places its imprimatur on the affiliation decision when it issues a bargaining order in favor of the affiliated union no less than when it amends an outstanding certification in its favor.

[4]It is possible that, even after a majority of the unit employees have approved the affiliation in a union-conducted vote, the Board would nonetheless call a formal unit-wide representation election if it found that the post-affiliation union was substantially different from the

A union organizational change such as an affiliation differs from other decisions which also may affect the bargaining unit in that the latter do not call for the Board to change the designation of the statutory representative for the unit. As the Seventh Circuit stated in *United Retail Workers Union Local 881* v. *NLRB,* No. 84-2000 (Oct. 1, 1985), slip. op. 20, in sustaining the *Amoco IV* rule as applied to a union merger:[5]

> [A] merger affects the relationship between a union and its members in much the same way as contract ratifications and elections of union officers. In one crucial aspect, however, a merger election differs from the other internal union affairs: Its effects are not limited to the relationship between a union and its members. Instead, it has external ramifications. For example, after an affiliation or merger, a union inevitably seeks an amendment to its certification, as in *Amoco,* or files unfair labor practice charges with the Board, as in the present case. Thus, because petitioner

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pre-affiliation union. But, where there is a lack of continuity, a Board-conducted election is not simply another method of determining whether a majority of the unit employees want to be represented by the new entity. Rather, the situation is comparable to an initial recognition situation wherein the employer—even though it may have no reason for doubting the union's majority status—is entitled to have the representation question determined in a Board-conducted election, in which it will have an opportunity to express its views to the employees. See NLRB Br. 27-28.

Contrary to the Union's assumption (Resp. Br. 24), the Board, having found that the unit-wide vote required by *Amoco IV* was not held, dismissed the Union's petition to amend the certification without reaching the further question whether there was sufficient similarity between the old and newly affiliated union so that the latter could be deemed a continuation of the former (Pet. App. 47a, 51a-52a).

[5]The Seventh Circuit thus joins the Fifth Circuit, which had previously approved the *Amoco IV* rule. *Local No. 4-14, Oil Workers Int'l Union* v. *NLRB,* 721 F.2d 150 (5th Cir. 1983).

invoked the external authority of the Board in an attempt to establish that the employer had committed an unfair labor practice, the Board could rationally require an additional indicium of unit-wide majority support for the merger, while avoiding the imposition of the entire set of procedures required in a Board-conducted election. The additional indicium that *Amoco* requires is that all unit employees have the opportunity to vote.

2. The Union is on no firmer ground in contending (Resp. Br. 35-36) that the *Amoco IV* rule runs counter to the Act's policy of promoting stable bargaining relationships. As pointed out in our opening brief (at 28-29), the requirement that all unit employees have an opportunity to participate in the vote on affiliation minimizes the potential for disruption. Since employee views will be obtained before the affiliation is irreversibly consummated, the union can base its decision on these views: if the vote is against affiliation, it can retain its independent status and its certification, while if the vote is in favor of affiliation, it can proceed with confidence that, even if the Board should later decide that a lack of continuity requires a Board-supervised election, it is likely to prevail in that election. In contrast, under the procedure required by the court below and favored by the Union, the union's affiliation may result in decertification, and the loss of the privileges of certified status, if the Board determines—after the affiliation has occurred—that lack of continuity has raised a question concerning representation requiring a Board-run election, and the union loses that election.

Moreover, as the Seventh Circuit noted in *United Retail Workers Union Local 881,* slip op. 25, "the *Amoco [IV]* rule should result in a decrease in the amount of litigation on merger issues." For, "[u]nder *Amoco,* a union is certain to include all unit employees in a merger vote. If the vote

carries, employers faced with certain majority support for the post-merger organization might be dissuaded from further contesting the validity of the merger." The same result could be expected from application of the *Amoco IV* rule to affiliations.

3. The Union errs in asserting that the *Amoco IV* rule impermissibly interferes in internal union affairs and "compel[s] unions to grant nonmembers the right to participate in the union's affiliation decision-making process" (Resp. Br. 24, 36-38). The rule does not require a union to allow nonmembers to participate in its internal decision to affiliate; it only requires the union to conduct a referendum open to all bargaining unit employees, both union members and nonmembers, if that internal decision is to serve as a basis for Board certification that the newly affiliated union is entitled to continued recognition as a statutory bargaining representative for the unit.[6] To be sure, some unions

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[6]In support of its contention that affiliation decisions are solely internal union matters, unrelated to representation issues, the Union asserts (Resp. Br. 29-30 n.16) that where, unlike the instant case, a union represents more than one bargaining unit, it "is a logical impossibility" for the union's internal affiliation vote to indicate separately the employees' sentiments in each unit, and that "the Board has rejected the proposition that [in such situations] affiliation votes must be conducted unit-by-unit." Neither contention is correct. First, as shown above, the decision of a union and its members to affiliate is separate from the question whether that decision may serve as a basis for Board amendment of the designation of the representative for a particular bargaining unit. If a union representing several bargaining units chooses to affiliate, the newly affiliated organization simply will not be entitled to recognition as the certified bargaining representative in units that fail to approve that step. Second, the union misapprehends Board policy, relying solely on *William B. Tanner Co.*, 212 N.L.R.B. 566 (1974). That case, however, was denied enforcement precisely because there was no substantial evidence to support a finding that the newly merged union "is the authorized representative of the employees in the appropriate unit" 517 F.2d 982, 983 (6th Cir. 1975)). Cases decided under *Amoco IV* follow not *Tanner*, but *Safway Steel Scaffolds Co.*, 173 N.L.R.B.

have allowed nonmembers to vote in their internal affiliation or merger elections as a means of allowing the entire bargaining unit an opportunity to pass on the change in its statutory representative (see cases cited at NLRB Br. 25). But this procedure is not required by *Amoco IV*, and other unions have followed a two-step procedure of an internal, members-only vote followed by a unit-wide vote open to both members and nonmembers (see cases cited at NLRB Br. 25). Thus, the *Amoco IV* rule is not focused on any internal union matter but merely establishes the conditions that a newly affiliated or merged organization must fulfill in order to succeed to the status of statutory bargaining representative enjoyed by its predecessor organization.[7]

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311 (1968)—the leading pre-*Tanner* decision requiring unit-by-unit determination of employee consent in merger and affiliation cases. *Safway Steel Scaffolds Co.* formed the basis for the dissent from the Board's *Tanner* decision and the court's refusal to enforce it. See *F. W. Woolworth Co.*, 268 N.L.R.B. 805, 806 n.5 (1984), petition for review pending *sub nom. United Food & Commercial Workers Local 568* v. *NLRB*, No. 84-1243 (D.C.Cir.); cf. *May Dep't Stores Co.*, 268 N.L.R.B. 979, 980 n.3 (1984), aff'd *sub nom. United Retail Workers Union Local 881* v. *NLRB*, No. 84-2000 (7th Cir. Oct. 1, 1985) (noting, in upholding the Board's refusal to require an employer to bargain with a newly merged union, that there was no way to determine how the employees in the separate bargaining units had voted in the election approving the merger); *Amoco Production Co. (Amoco IV)*, 262 N.L.R.B. 1240, 1241 (1982) (emphasizing that "all unit employees" must be afforded the opportunity to vote on the affiliation).

[7]Nor is the union aided by the Labor-Management Reporting and Disclosure Act (LMRDA), 29 U.S.C. 401 *et seq.* That statute expressly provides that none of the provisions here relied upon by the Union (Resp. Br. 40-48) "shall * * * be construed * * * to impair or otherwise affect the rights of any person under the National Labor Relations Act" (29 U.S.C. 523(b)), and further states that "[e]xcept as explicitly provided to the contrary, nothing in this chapter shall reduce or limit the responsibilities of any labor organization * * * under any other Federal law * * *"(29 U.S.C. 523(a)). Because, as we have shown, the *Amoco IV* requirement of a unit-wide vote on affiliations or other

For these reasons, as well as those set forth in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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similar union organizational changes is a valid exercise of the Board's authority under the National Labor Relations Act, it does not violate the policy against interference in internal union affairs embodied in the LMRDA. See also *Scofield* v. *NLRB*, 394 U.S. 423, 430 (1969); *Pattern Makers' League* v. *NLRB*, slip op. 9-10.

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